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CASE COMMENTS

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CASE COMMENTS

CORPORATIONS — Close Corporations — Strictness of Requirements at Meetings of Shareholders and Directors.— The courts, legislatures, lawyers, and businessmen are becoming confronted more and more by problems that are peculiar to the “close”, “closed”, or “closely held corporation”. However, this is to be expected because the “close corporation” is probably the most prevalent form of business entity in use in the United States.¹

The first problem that one encounters in this field is in arriving at a definition for this form of business entity. Our comment deals with the “close corporation” as opposed to the “public issue corporation”. Our American “close corporation” is roughly equivalent to the “private limited company” under the law of England. The “private limited company” is defined by statute in the Companies Act of 1948,² and is as follows:

For the purpose of this ACT, the expression “private company” means a company which by its articles —

- (A) restricts the right to transfer its shares; and
- (B) limits the number of its members to fifty, not including persons who are in the employment of the company and persons who, having been formerly in the employment, and have continued after that determination of that employment to be, members of the company; and
- (C) Prohibits any invitation to the public to subscribe for any shares or debentures of the company.

However, in the United States, we have not as yet arrived at a clear definition. In the United States the “close corporation” is usually defined as a corporation in which the capital is held by a few individuals, rarely changes hands, and management and ownership are usually vested in the same people. The “close corporation” is distinguished from the “public issue corporation” where shares are widely held, and, as a

1. See *The Business Lawyer* Vol. XIII, at 741.

2. COMPANIES ACT, 1948, 11 & 12 Geo. 6, C. 38, §28 (1). For an interesting article on the European counterpart of our American “close corporation” see *The Business Lawyer* Vol. XIV, at 215.

general rule, management and ownership are not usually vested in the same people.³

American statutes vary substantially from each other, except for those that have adopted the *ABA Model Business Corporation Act*. Four states have, in attempting to cope with the problems of "close corporations", enacted statutes permitting "partnership associations with limited liability". However, as a general rule, the lawyers and businessmen in these states still incorporate "close corporations" under the general corporate statutes.⁴ Lawyers have long recognized that there is an actual and practical difference between "closely held" and "public issue corporations".⁵ Therefore, in the United States, "close corporations" have developed by custom and practice rather than legislative action. In solving the problems of "close corporations" the courts, as a general rule, have attempted to apply the statutory and case law developed usually for corporations with a different character. Nevertheless, some courts have frequently recognized the actual, practical differences between "close corporations" and "public issue corporations", especially in permitting the "closely held corporation" to depart from strict corporate formalities.

A recent important South Carolina case, *Freeman v. King Pontiac Co.*,⁶ recognizes the practical difference between the *strict formality requirements* of a "close corporation" and those of a "public issue corporation". The dicta in this case should afford a useful guide for future decisions in South Carolina when the courts are presented with issues relating to the formality requirements of "close corporations".

King Pontiac, the defendant in this case, was a "closely held corporation". In August, 1955, its forty shares were held as follows: thirty-eight shares by Bray's Island Planta-

3. See 1 O'NEAL — CLOSE CORPORATIONS: LAW AND PRACTICE, at 81 for additional definitions of "close corporations", collection of cases on formality requirements, and comments on formality requirements of "close corporations". For a good judicial definition see *Brooks v. Willcuts*, 78 F. 2d 270, at 273 (CAA 8th, 1935). THE SOUTH CAROLINA BUSINESS CORPORATION ACT OF 1962, Section 6.22 (b) gives a definition to the "close corporation" for purposes of that particular section.

4. See 34 N. C. L. REV. 432, at 456. Dean E. R. Latty, Duke University Law School, comments on the "partnership association with limited liability" statutes of Pennsylvania, Michigan, New Jersey, and Ohio.

5. See 33 CORN. L. Q. 488.

6. *Freeman v. King Pontiac Co.*, 236 S. C. 335, 114 S. E. 2d 478 (1960). This case noted in 14 S. C. L. Q. 13.

tion, Inc., a corporation owned by F. B. Davis, Jr., one share by Davis himself, and one share by E. L. Freeman. The directors of the corporation were Davis, Freeman, and C. W. Pratt. Freeman was also the vice-president, secretary-treasurer, assistant to the president and general manager of King Pontiac, Inc. The by-laws specified that the annual meeting of the corporation would be held on the fifteenth of July of each year, at the office of the corporation.

Freeman was discharged by a newly elected board of directors for failure to obey a command of the president, F. B. Davis, Jr. Freeman contended, *inter alia*, that the meeting at which he was discharged was illegal because it was not held at the office of the corporation, as required in the by-laws. Judge Oxner said, *inter alia*, "This was a closely held corporation almost wholly owned by Davis who was present at the meeting. Under such circumstances, less formality is required in holding meetings. It would be unreasonable to hold that this meeting was invalid simply because these directors decided to meet at Bray's Island Plantation instead of Columbia."⁷

In the instant case, the court did not attempt to fit the contention of the plaintiff into a pattern of law that had developed from corporate law in general; instead, the court considered the circumstances of this particularly "closely held corporation", and decided what was reasonable. Furthermore, this was not the first time that a South Carolina court had tolerated departure from strict corporate formality. Thus, in *Industrial Equipment Co. v. Montague*,⁸ the Supreme Court affirmed a jury instruction that "respondent committed no wrong if he cashed the checks and distributed the proceeds to the stockholders of the corporation, who were also all of its officers and directors, as salary or wages, despite the lack of formal corporate action, directors meetings and minutes. Formal directors meetings and minutes are not indispensable to corporate action in all cases."⁹ Here again we see the court permitting a "close corporation" to deviate from strict formality, and here again was a situation in which the court could consider the facts and circumstances and arrive at a decision based on reason and logic, not statutory and case-

7. *Ibid.*, at 350, 114 S. E. 2d 478, at 485.

8. *Industrial Equipment Co. v. Montague*, 224 S. C. 510, 80 S. E. 2d 114 (1954). This case cited in *Freeman v. King Pontiac*, *supra* note 6.

9. *Ibid.*, at 516, 80 S. E. 2d 114, at 117.

law that had been developed to protect not only third persons, but also stockholders who had no part in the management of the corporation.

In most instances "close corporations" are formed because the owners seek limited liability and, in some cases, certain tax advantages. However, notwithstanding these corporate advantages, the owners desire to retain certain of the attributes of a partnership, particularly with respect to the formality requirements. In effect, what they really desire is an "incorporated partnership".¹⁰

In a "close corporation" where the owners manage the enterprise, there is really no practical reason for observing formalities, especially since formalities are required by law chiefly to protect non-manager owners.¹¹ Moreover, unnecessary expense and costly delays can be eliminated in many cases by dispensing with some of these unnecessary rituals. The folly of requiring such rituals was ably stated in a 1935 South Carolina case, *Alderman v. Alderman*,¹² involving litigation over a voting trust in a "close corporation". It was argued that the trust was voidable because, *inter alia*, the trustees held no stockholders' or directors' meetings. The court answered: "Looking at it from a purely practical standpoint, there would seem to have been little occasion for having such meetings. R. J. and P. R. Alderman after the trust period were the only two legal stockholders, they were both actively running the whole business, giving it their constant and personal attention, were both present and engaged together in the same offices and probably hourly and daily conferring with each other. Certainly the corporations have suffered no actual injury by their failure to sit down annually in a formal meeting or at intervals as directors and call themselves to order and keep minutes of what they resolved to do at some special time. The corporations are functioning, regardless of the failure to hold these meetings; are being recognized everywhere as corporations; are being taxed as such by the State and Federal governments and have recognition in all respects as corporations."¹³

South Carolina is not unique in its treatment of this problem. In a New York case, *Simonson v. Helburn*,¹⁴ a sim-

10. See 59 YALE L. J. 1040.

11. See STEVENS ON CORPORATIONS, at page 10.

12. *Alderman v. Alderman*, 178 S. C. 9, 181 S. E. 897 (1935).

13. *Ibid.*, at 31, 181 S. E. 897, at 906.

14. *Simonson v. Helburn*, 97 N. Y. S. 2d 406 (1950).

ilar result was reached. Here the court said that, "It has long been recognized in New York that the directors of a close corporation, when few in number, and in frequent contact with each other may act effectively without going through the useless formality of convening as a board."¹⁵

In *Sharon Herald Co. v. Granger*,¹⁶ a Federal Court, interpreting Pennsylvania law reached a like result basing its opinion on the principles of equitable estoppel. The court said, "The doctrine of permitting close corporations to act informally is recognized as an exception to the general rule that directors must act as a board at duly convened meetings. The exception is founded upon principles of equitable estoppel and is limited to instances in which the custom or usage of the directors is to act separately or informally and not as a board." This court in the same opinion stated, "Closed or small corporations may act informally and proof of their actions need not be confined to the formal minutes of meetings but may be established by other means."¹⁷

The courts have recognized the unreasonableness of formality requirements in "close corporations" in areas other than directors and shareholders meetings, minutes, etc. In *Kauffman v. Meyberg*,¹⁸ a California case, the court dealt with stock certificates. In this case the founder of a "close corporation" had bequeathed all of the stock in it to his two children in equal ownership. The court refused to sustain a contention that one of the children was not entitled to vote his shares because valid share certificates had not been issued to him.¹⁹

The laws governing the "public issue corporations" were devised to protect investors as well as third parties. It is imperative that the state protect those who buy into enterprises of which they cannot obtain an insider's detailed knowledge, and must protect those who own such shares without any control over the use of their funds. However, in the "close corporation", the need to protect the investor is quite different. Like the partner, he picks his associates and generally shares control of his money. On the other hand, he is in a position where he must place his trust in each of his

15. *Ibid.*, at 413.

16. *Sharon Herald Co. v. Granger*, 97 F. Supp. 295 (1951).

17. *Ibid.*, at 301.

18. *Kauffman v. Meyberg*, 59 Cal. App. 2d 730, 140 P. 2d 210 (1943).

19. *Ibid.*, at 739, 140 P. 2d 210, at 215.

fellow-stockholders. In "public issue corporations", the shareholders must perforce put their trust in management — the officers and directors who often hold only a small proportion of the stock of the corporation.²⁰ Therefore, formalities in management have no utility in the "close corporation". In Iowa, the necessity for a board, has been eliminated in the "close corporation".²¹ No other state has seen fit to go this far, and this fact alone indicates that most jurisdictions deem it more advisable to have less formality in "close corporations" than "public issue corporations"; rather than no formality at all.

The *ABA Model Business Corporation Act* permits informal procedure for stockholders; however, the ACT does not authorize any similar informal procedure for directors. The ACT states in Section 138 as follows:

Any action required by this ACT to be taken at a meeting of the shareholders of a corporation, or any other action which may be taken at a meeting of the shareholders, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the shareholders entitled to vote with respect to the subject matter thereof, and such consent shall have the same force and effect as a vote of shareholders.

The North Carolina Corporation Law has sections authorizing informal procedure for shareholders and directors. NORTH CAROLINA § 55-29 (a) states:

Action taken by a majority of the directors or members of a committee without a meeting is nevertheless board or committee action if:

- (1) Written consent to the action in question is signed by all the directors . . . , or if
- (2) All the shareholders know of the action in question and make no prompt objection thereto, or if
- (3) The directors or committee members are accustomed to take informal action and this custom is generally known to the shareholders and if all the directors . . . , know of the action in question and no director makes prompt objection thereto.

20. See 28 CORN. L. Q. 313 .

21. See 52 N. W. U. L. REV. 345, at 397.

NORTH CAROLINA § 55-73 (b) reads as follows: . . .

Except in cases where the shares are at the time or subsequently become generally traded in the markets maintained by securities dealers or brokers, no written agreement to which all of the shareholders have actually assented, whether embodied in the charter or by-laws or in any side agreement in writing and signed by all the parties thereto, and which relates to any phase of the affairs of the corporation, whether to the management of its business or division of its profits or otherwise, shall be invalid as between the parties thereto, on the ground that it is an attempt by the parties thereto to treat the corporation as if it were a partnership or to arrange their relationship in a manner that would be appropriate only between partners.

Connecticut, likewise, has enacted statutes permitting shareholders and directors to act informally. CONNECTICUT § 33-330 reads as follows:

Any action which, under any provision of this chapter, may be taken at a meeting of shareholders may be taken without a meeting if consent in writing, setting forth the action so taken or to be taken, is signed by all of the persons who would be entitled to vote upon such action at a meeting,

In dealing with informal action by directors, CONNECTICUT § 33-316 (d) states:

If all the directors severally or collectively consent in writing to any action to be taken by the corporation, and the number of such directors constitutes a quorum for such action, such action shall be as valid corporate action as though it had been authorized at a meeting of the board of directors.

New York in its excellently drafted General Business Corporation Act also authorizes informal action by shareholders and directors. NEW YORK GENERAL BUSINESS ACT § 602 (b) reads as follows:

A meeting of shareholders shall be held annually for the election of directors and the transaction of other business on a date fixed by or under the by-laws. A failure to hold the annual meeting on the date so fixed

or to elect a sufficient number of directors to conduct the business of the corporation shall not work a forfeiture or give cause for dissolution of the corporation

In authorizing informal director meetings the NEW YORK GENERAL BUSINESS ACT § 711 (c) states:

Notice of a meeting need not be given to any director who signs a waiver of notice whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to him.

It is readily apparent from the corporation laws cited that the trend in enacting new corporate statutes is to extend to "close corporations" authorization to act informally in their management function.

The South Carolina Assembly during its 1962 session enacted a new corporation statute²² which takes account of the problems and peculiarities of the "closely held corporation". Many sections of this act are designed to meet the special needs of the "close corporation", and some are specifically limited to "close corporation", although others are not. The SOUTH CAROLINA BUSINESS CORPORATION ACT OF 1962 in authorizing informal action by shareholders and directors is similar to the provisions to be found in the Connecticut and North Carolina statutes.²³ Section 6.18 of the Act concerns shareholders actions and is as follows:

(a) Action taken at any meeting of shareholders, however called and with whatever notice, if any, is as valid as though taken at a meeting duly called and held on proper notice, if:

- (1) All shareholders entitled to vote at the meeting are present in person or by proxy, and no shareholder objects to holding the meeting; or
- (2) If a quorum is present either in person or by proxy, no one present objects to holding the meeting, and each absent person entitled to vote at the meeting signs, either before or after the meeting, a written waiver of notice, or consent to the holding of the meeting, or ap-

22. THE SOUTH CAROLINA BUSINESS CORPORATION ACT OF 1962.

23. See DRAFT VERSION, SOUTH CAROLINA BUSINESS CORPORATION ACT OF 1962, reporter's note at page 111.

proval of the action taken as shown by the minutes thereof. All such waivers, consents, or approval shall be filed with the corporate records or made a part of the minutes of the meeting. The absence from the minutes of any indication that a shareholder objected to holding the meeting shall *prima facie* establish that no such objection was made.

- (b) Action required or permitted under this Act to be taken by shareholders may be taken without a meeting if a written consent, setting forth the action so taken, is signed by the holders of all outstanding shares entitled to vote on such action and is filed with the secretary of the corporation as part of the corporate records. Such written consent shall have the same effect as a unanimous vote of the shareholders and may be stated as such in any certificate or document required to be filed with the Secretary of State.

Section 8.11 of the ACT in permitting informal directors procedure states:

- (a) Action taken by a majority of the directors without a meeting shall be valid if
 - (1) Written consent to the action taken is executed, either before or after the action so taken, by all of the directors and is filed with the minutes of the proceedings of the board or committee, or
 - (2) All shareholders have actual knowledge of the action taken, and no shareholder makes prompt objection thereto.
- (b) If a meeting otherwise valid of the board of directors or of any committee is held without call or notice where such is required, any action taken at such meeting shall be deemed ratified by a director or committee member who did not attend, unless after learning of the action taken and of the impropriety of the meeting, he makes prompt objection thereto.
- (c) Objection by a shareholder, director, or committee member shall be effective only if written objection

to the holding of the meeting or to any specific action so taken is filed with the Secretary of the corporation.

The reporter of the committee noted in the Draft Version,²⁴ "These provisions by their very nature are of use only to the close held corporation which conducts its business with a maximum of informality." It is expected that larger corporations will adhere to formality requirements that have heretofore been used. The new law recognizes and implements the rulings of the South Carolina Supreme Court in *Industrial Equipment Co. v. Montague*²⁵ and *Freeman v. King Pontiac Co.*²⁶ dealing with the formality requirements of "close corporations".²⁷ The committee drafting the new South Carolina Corporation statute properly did not attempt to set out specifically when formality requirements must be adhered to. As was previously stated, it is almost impossible to define clearly a "close corporation"; therefore, the courts, rather than construe a statute, will only have to look at the circumstances and decide what is reasonable. This flexibility will permit courts to deal with reality, rather than trying to fit a particular set of circumstances into a particular statute. The vehicle for determining the necessary formality requirements of "close corporations" is the court rather than the legislature, for only in the courts can we find the solution for so many varied and different circumstances.

In short, one correct approach is expressed by the statement in an Alaskan case²⁸ dealing with the validity of directors meetings, "the court is governed not so much by degree of formality observed as by practical and legal effect of the action taken in view of the circumstance."²⁹ This view, coupled with Judge Oxner's dicta in *King Pontiac, supra*, and the "close corporation" sections of the new South Carolina Corporation Act should eliminate the need for further legislation in this field.

FALCON B. HAWKINS.

24. *Supra* note 23.

25. *Supra* note 8, at 516, 80 S. E. 2d 114, at 117.

26. *Supra* note 6, at 350, 114 S. E. 2d 478, at 485.

27. DRAFT VERSION, SOUTH CAROLINA BUSINESS CORPORATION ACT OF 1962, Section 8.11, see reporter's note at 151.

28. *Port Chilkoot Co. v. Heinmiller et al.*, 12 Alaska 200 (1948).

29. *Ibid.*, at 209.

TRADE REGULATIONS — How Not to Harmonize Section 5 with the Robinson-Patman Act. — The Robinson-Patman amendments¹ to section 2 of the Clayton Act were enacted in 1936 to preserve traditional channels of market distribution by restricting the buying methods of chain-stores.² The result of intensive lobbying by wholesale grocers,³ the Act was an unhappy miscegenation between NRA theory of protectionism and the general antitrust theory of market competition.⁴ Aside from its murky legislative history,⁵ obscure wording,⁶ and internal conflicts,⁷ critics and, eventually, the courts recognized the basic contradiction between Robinson-Patman specific illegality and the more general prohibitions of earlier antitrust laws, which permitted a Rule of Reason approach to the problems of insuring economic competition.⁸ The discord prompted Mr. Justice Frankfurter to remark that "the policies directed at maintaining effective competition, as expressed in the Sherman Law, the Clayton Act, as amended by the Robinson-Patman Act, and the Federal Trade Commission Act are difficult to formulate and not altogether harmonious".⁹ Shortly thereafter the Su-

1. 49 STAT. 1526 (1936), 15 U. S. C. §§ 13(a)-(f) (1952).

2. Rep. Wright Patman himself has remarked that "one certain big concern had really caused the passage of this Act, the A. & P. Co." *Hearings Before the Antitrust Subcommittee of the House Judiciary Committee on Bills to Amend the Clayton Act*, 84th Cong., 2d Sess. 57 (1956). For a pungent account of Robinson-Patman origins, see Rowe, *The Evolution of the Robinson-Patman Act: A Twenty Year Perspective*, 57 COL. L. REV. 1059 (1957).

3. EDWARDS, *THE PRICE DISCRIMINATION LAW 1-53* (Brookings Inst. (1959)).

4. Rowe, *supra*, p. 1088.

5. EDWARDS, *supra* n. 4.

6. Rep. Emanuel Celler, calling the Act a "hodgepodge," charged that it "contains so many inconsistencies [that] the courts will have the devil's own job to unravel the tangle . . . You have the herculean task to make it yield sense." 80 Cong. Rec. 9419 (1936).

7. Stedman, *Twenty-four Years of the Robinson-Patman Act*, 1960 WIS. L. REV. 197, 218 (1960). The author comments, "the relationship of subsections (c), (d) and (e) to subsection (a) and to each other, is a hodge-podge of confusion and inconsistency that any competent, ordering lawyer must find offensive."

8. Mr. Justice Jackson highlighted the problem when he observed, "We have vacillated and oscillated between the N.R.A. theory, roughly, and the Sherman Anti-Trust Law theory ever since I can remember, and we are still wobbling." *Transcript of Oral Argument*, Oct. 9, 1950, p. 49, *Standard Oil v. F.T.C.*, 340 U. S. 231, 95 L. Ed. 239 (1951). In speaking of these contradictory antecedents Rowe has charged, "the compromise of 1936 was the offspring of a mixed marriage between antitrust and NRA, born with a legal split personality." Rowe, *Expectation Versus Accomplishment*, 17 A.B.A. ANTITRUST SECTION at 301 (1960).

9. *F.T.C. v. Motion Picture Advertising Service Co.*, 344 U. S. 392, 405-406, 97 L. Ed. 426, 436 (1953) (dissenting opinion of Justices Frankfurter and Burton).

preme Court, through the same Justice, enunciated its "duty to reconcile" the stricter Robinson-Patman Act "with the broader antitrust policies that have been laid down by Congress."¹⁰ To the Attorney General's Committee the "duty to reconcile" meant to resolve "every statutory doubt in favor of the Sherman Act's basic antitrust directives . . . accommodating all legal restrictions on the distributive process to dominant Sherman Act policies."¹¹ That the FTC could aid in reconciling the two was an optimistic suggestion of the Committee. The FTC, however, has had other thoughts on the subject. The purpose of this note is to examine the Commission's position in one area of Robinson-Patman enforcement: What to do with a buyer who induces sellers to violate the Act.

The historical anomaly of Robinson-Patman is that, although aimed at the buying practices of the chains, its prescriptions, with two exceptions,¹² were placed on sellers.¹³ Far from attempting to reconcile this strict illegality with antitrust Rule of Reason doctrine, the Commission has been quick to exploit those sections of the Act which contain no built-in defenses.¹⁴ The exempt buyer, however, has posed a problem to the FTC. That buyer who induced or knowingly accepted a price discrimination, a 2(a) offense by the seller, could be attacked under the troublesome 2(f); that buyer who induced a violation of 2(c) could be reached under 2(c)'s own terms. But the 2(d) or 2(e) inducer was exempt (be-

10. *Automatic Canteen Co. v. F.T.C.*, 346 U. S. 61, 63, 97 L. Ed. 1454, 1458 (1953).

11. REPORT OF THE ATT'Y GEN. COMMITTEE TO STUDY THE ANTITRUST LAWS, 131 (1955).

12. Subsection 2(f) applies exclusively to buyers who knowingly induce or accept price discriminations of the sort which 2(a) makes it unlawful for sellers to grant. Subsection 2(c) applies to buyers and sellers alike.

13. Subsection 2(a), 2(c), 2(d), and 2(e) make certain specific practices illegal for sellers. Subsection 2(b) is a matter of defense available to sellers who grant and buyers who accept price discriminations.

14. Rowe pointedly attacks the FTC on this point:

[A] quaint phenomenon has been the traditional fascination with litigation statistics — what ex-Commissioner Lowell Mason calls the 'numbers game'. This preoccupation with scalps, rather than the more permanent values of Robinson-Patman enforcement, shows up in the startling rise of proceedings under the *per se* prohibitions governing brokerage and advertising allowances (of some 319 Robinson-Patman complaints since October 1, 1956, 190 have been issued under the provisions of 2(c) and 2(d).) . . . Rather than symptomizing an epidemic of brokerage or promotional misconduct on the part of business, I suspect the statistics indicate a Parkinson's law of Patman enforcement — that complaints grow in proportion to the ease of winning the case. Rowe, *supra*, n. 8, at 311-312.

cause he was not included) under the express provisions of the law. As early as 1955 the Commission devised a means of attacking such a buyer.¹⁵ In two recent cases that means has ripened into judicial doctrine, blessed with the sanction of a Court of Appeals. *The Grand Union Co.*¹⁶ and its companion *American News Co. & Union News Co.*¹⁷ now stand for the proposition that a buyer who induces a violation of 2(d) has engaged in an "unfair method of competition" under section 5 of the Federal Trade Commission Act.

These two and other similar decisions raise three basic queries: 1) Should the four antitrust statutes be construed *in pari materia*? 2) Assuming that they should, have these two decisions so construed them? 3) If construction *in pari materia* is the end to be desired, does the present interpretation represent the best means of achieving that end? Within this framework the arguments of the proponents and the opponents of the *Grand Union* doctrine will be examined. An alternative (and more desirable) means of reaching the same end will then be suggested.

To determine whether the Sherman Act, the Clayton Act, the FTC Act, and the Robinson-Patman Act should be con-

15. *United Cigar-Whelan Stores Corp.*, F.T.C. Dkt. 6525 (1956).

16. *The Grand Union Co.*, TRADE REG. REP. (Federal Trade Commission Complaints, Orders, Stipulations, 1960-1961) ¶ 28980, at 37478. In the *Grand Union* case, defendant, a chain store, agreed with an advertising agency, owner of a "spectacular" sign in Times Square, that in return for procuring advertisers the defendant could use the sign at a nominal fee. *Grand Union*, by promises of in-store promotions or other preferential treatment, induced some of its suppliers to advertise through the agency. Later, the agreement was modified so that *Grand Union* gave up its advertising time, and in return the agency paid defendant 5% of the amount paid by 3/4 and 100% of the remaining 1/4 of the advertisers it procured. The hearing examiner found defendant's suppliers had clearly violated 2(d) because they had given *Grand Union* advertising allowances which they had not made available on a proportionately equal basis to its competitors; that *Grand Union* knew the payments made to the agency were illegal since the whole purpose of the arrangement had been to avoid sellers' necessity to proportionatize; that inducing the sellers to violate 2(d) was an unfair method of competition.

17. *The Union News Co.*, TRADE REG. REP. (Federal Trade Commission Complaints, Orders, Stipulations, 1960-1961) ¶ 29335, at 37664. The *American News* facts are slightly different. *American* and its wholly owned subsidiary, *Union*, the largest single retail newsstand operation in the U. S., coerced magazine publishers into granting substantial rebates in the form of promotional and advertising allowances. This they did by threatening to stop selling the magazines of the uncooperative publisher. The examiner also determined that defendant was using part of the allowances to out-bid competing newsstand operators for choice locations and thereby to better increase its coercive advantage. There was no finding that the publishers had violated 2(d) although a list of suits filed against these sellers by the FTC was included in the report.

strued *in pari materia*, it is useful to start with the "fundamental proposition," as one authority has put it, that

. . . statutes related to the common end of maintaining effective competition should be construed together as interlaced expressions of national antitrust policy. This canon of statutory interpretation, known under the designation statutes *in pari materia*, applies where, as here, the generality of the standards of the Sherman Act and sec. 5 must be accommodated to the specific provisions of the Clayton Act.¹⁸

Those who oppose the attempt to harmonize the general with the specific have done so at length too great to examine here. What they propose generally is repeal of the Robinson-Patman Act, on the theory that it produces price rigidity and, thereby, price discrimination, in the economic sense of the term. Considering the hypnotic effect of "small business" on Congress, this solution is, at best, an unlikely one. It is enough here to note that their arguments are legal,¹⁹ economic,²⁰ and convincing.²¹

Although reconciliation of the four major antitrust statutes ultimately may be the less desirable of two alternatives, it is for the present the more realistic, as Justice Frankfurter has noted.²² Then, to what extent do the decisions in *Grand Union* and *American News* represent constructions *in pari materia*, to what extent has harmony among the applicable statutes been achieved? It is safe to say there are two distinct schools of thought on the use of section 5 to make buyers liable for sellers' violation of 2(d). A majority of the FTC²³ and of the Second Circuit²⁴ have enunciated their

18. Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. at 823-24 (1960).

19. Rowe, *supra* n. 2.

20. Jules Backman, *An Economist Looks at the Robinson-Patman Act*, 17 A.B.A. ANTITRUST SECTION 343 (1960). As Dr. Backman points out at pp. 345-50, "The Robinson-Patman Act does not deal with price discrimination in the economic sense . . . [B]y tending to eliminate price differentials, the Robinson-Patman Act creates economic price discrimination rather than eliminating it. This is truly an Alice in Wonderland approach."

21. Edwards *supra* n. 3. This study is not only convincing, it is overwhelming.

22. See *supra* n. 10.

23. See *supra* n. 16, 17.

24. *Grand Union v. F.T.C.*, TRADE REG. REP. (1962 Trade Cas.) ¶ 70224, at 75,845 (2d Cir. Feb. 19, 1962). *American News Co. and the Union News Co. v. F.T.C.*, TRADE REG. REP. (1962 Trade Cas.) ¶ 70225, at 75,854 (2d Cir., Feb. 19, 1962).

version of construction *in pari materia*, with the support of Professor S. Chesterfield Oppenheim.²⁵ Dissenters on the Commission²⁶ and the bench²⁷ have been joined by Professor Milton Handler²⁸ in deploring the majority view.

The construction the Commission achieved was one aimed at a specific practice. The aim of Robinson-Patman is to outlaw the abuse of purchasing power by large buyers. While inducing price discriminations was made expressly illegal, the practice of achieving discriminatory promotional allowances remained unprohibited through legislative oversight.²⁹ In absence of clear Congressional intent to sanction such practices, and in absence of direct conflict between Robinson-Patman and the FTC Act, section 5 may be used to deal with acts which come within Robinson-Patman spirit if not its letter. The Commission has the power within a given situation to declare a particular practice an unfair method of competition. In applying the imprecise "unfair method" standard, the Commission is not restricted to what has been decided illegal under the Sherman Act³⁰ or the Clayton Act,³¹ but rather it must "hit at every trade practice" which would then or thereafter lead to "such a restraint if not stopped in its incipient stages."³² The very purpose of the FTC Act is "to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipency acts and practices which, when full-blown, would violate those Acts."³³

Commissioner Tait and Professor Handler responded that the majority had usurped legislative powers by trying to plug a loophole which, they believed, Congress had knowingly left open. The Commission can, in their view, enforce only what the statute proscribes; what the Commission did, on the other hand, was to legislate a substantive violation of the law on the theory that its omission in the original statute was in-

25. Oppenheim *supra* n. 18.

26. See *supra* n. 16.

27. See *supra* n. 24.

28. Handler, *Recent Antitrust Developments*, 71 YALE L. J. 75 (1961).

29. Dunn, *Sections 2(d) and 2(e)*, New York State Bar Assc., Robinson-Patman Symposium (CCH 1946), 55, 61.

30. *F.T.C. v. Beech-Nut Packing Co.*, 257 U. S. 441, 66 L. Ed. 307 (1922).

31. *Carter Carburetor Corp. v. F.T.C.*, 112 F. 2d 722 (8th Cir. 1940).

32. *F.T.C. v. Cement Institute, et. al.*, 333 U. S. 683, 92 L. Ed. 1010 (1948).

33. See *supra* n. 9.

advertent.³⁴ Thus, any violation of what the Commission deems the spirit of the antitrust laws can be arrested in absence of statutory mandate.³⁵ Commissioner Tait attacked the use of the language "supplement and bolster" on the ground that it was drawn from and confined to those cases applying the "incipiency" doctrine, which is not at issue in the instant case. In order to sustain a holding under section 5 under that doctrine there must be an embryonic violation of the Sherman or Clayton Acts as well as a factual conclusion of probable injury to competition, both of which elements are lacking here.³⁶ However accurate the Commissioner's argument on this point may be, Professor Handler's is more cogent. He reasons that the "incipiency" theory cannot be used to justify remolding the antitrust laws. The Clayton and FTC Acts were themselves enacted to curb incipient violations of the Sherman Act. There can be no incipient violation of either the Clayton or the FTC Act. If it is reasonably probable that an express practice will cause harm to competition the Clayton Act outlaws it.³⁷ Both Tait and Handler agree that the Commission has created a new substantive violation of law and, what is more, a *per se* violation which precludes consideration of probable anti-competitive effects of the condemned practice.

From the adverse ruling by the Commission the defendants carried their cause on appeal to the Second Circuit. In split decisions, that court upheld the FTC.³⁸ Judge Clark, writing

34. Both Commissioner Tait and Professor Handler base this argument on the view that Congress enacted Robinson-Patman only after exhaustive research. The Commissioner wryly notes that the majority's conclusion of omission through inadvertency is "scarcely" flattering to a Congress which had the benefit of a lengthy investigation on the subject and showed itself quite capable of dealing with those who received [2(c), 2(f)] insofar as it felt it should deal with them." See *supra* n. 16.

35. Professor Handler attempts to reduce the majority's arguments *ad absurdum* in a series of interrogatories, suggesting finally that under its view the "Robinson-Patman Act itself was unnecessary since section 2 of the original Clayton Act dealt generally with the problems of price discrimination and its frustrating inadequacies could have been transcended by the process of administrative bolstering and supplementation." Handler *supra* n. 28, at p. 92.

36. See *supra* n. 16 ¶ 28980, at 37,485.

37. Handler *supra* n. 28, at p. 97. While the "incipiency" doctrine is one of the less well settled corners of the antitrust law. Professor Oppenheim has put the blame for much of the confusion on Justices Douglas and Frankfurter in their majority and dissenting opinions in *Motion Picture Advertising v. U. S.*, *supra* n. 9. See Oppenheim *supra* n. 18, at p. 825 note 13. Of all the incipency theories propounded, that of Professor Handler is the most reasonable and coherent.

38. See *supra* n. 24.

for the majority, noted (patronizingly) at the outset that the Commission's decision in *Grand Union* had caused much stir in legal periodicals.³⁹ He then proceeded to set out the three elements of the decision. First, Congress did not purposefully exempt buyers from the proscription of 2(d). Rather, such practices were declared contrary to the public interest. Since a seller cannot violate 2(d) by giving a discriminatory allowance without a buyer receiving that allowance, Congress did not intend to sanction buyers' indulgence in the unlawful practice. Second, what the FTC has done in using section 5 to reach buyers has merely been to expand its jurisdiction "from the technical confines of 2(d)." The Commission has not created a new violation of the law. It has fully realized "the basic policy of the Robinson-Patman Act, which was to prevent an abuse of buying power."⁴⁰ The FTC has wholly within its power as an expert body to declare the defendant's practice here an unfair method of competition because defendant's activities are "inconsistent with the purpose" of 2(d). These activities enabled defendant to better its position at the expense of its competitors, and Congress has declared this to be contrary to public policy.⁴¹ Third, a violation of 2(d) by a seller is an offense *per se*. The Commission, therefore, does not have to show a seller's conduct injures competition. The rule should apply to the buyer violating the "basic policy" of 2(d) as it does to the seller who violates the letter of the law.

Since section 5 is used here to reach an integral part of a violation of section 2(d), and the rationale of the proceeding is to fulfill the policies of the prohibition, it would seem an unwarranted amendment of the legislative scheme to apply a different standard on the question of

39. Judge Clark makes reference to pp. 836-837, 851 of Professor Oppenheim's article. What he fails to note in that Oppenheim on pp. 839-845 offers a justification for the *Grand Union* Doctrine which is preferable to that offered by Judge Clark in the majority opinion. Had the judge, or his law clerk, read Oppenheim more thoughtfully, perhaps the decision of the Second Circuit in the instant case would be less open to criticism.

40. See *supra* n. 24, 70224, at 849.

41. The opinion cites in note 18 Sen. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936):

Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when, in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so.

competitive effects to the buyer than it applies to the seller.⁴²

In vigorous dissents⁴³ to both the *Grand Union* and the *American News* decisions⁴⁴ Judge Moore attacked the majority from two logically divergent positions. In his *Grand Union* dissent, he framed the issue before the court as a contrast in "judicial philosophies: Whether the law is to be enforced as enacted by Congress or whether it is to be enforced as the Commission thinks the law should have been enacted. To remake the law because of an alleged "inadvertent" omission is to legislate. Moreover, the omission of buyer liability could scarcely have been "inadvertent" since the Robinson-Patman Act followed an exhaustive probe and was expressly designed to "curb the power of the mass buyer." To supply what Congress omitted is to assume a power which makes specific antitrust acts "essentially superfluous".⁴⁵ As was Commissioner Tait, so is Judge Moore concerned with the *per se* nature of this new violation. To create another *per se* violation is to fail to construe the Robinson-Patman Act and section 5 of the FTC Act in harmony with the "broader antitrust concepts."

In his *American News* dissent Judge Moore urged that the buyer-defendant in this case had merely bargained for and received better terms, and that the majority's holding placed an intolerable burden on any buyer wanting to so bargain. The decision

... is a direct mandate to all buyers pursuing their supposed right to bargain for better terms . . . that they cannot accept such terms as may be agreed upon without analyzing the nature of business of seller's customers and determining if seller has offered proportionally equal terms to all. Congress knew this would be virtually impossible for a buyer to ascertain. It is difficult

42. See *supra* n. 24, 70224, at 75850. Why it is "an unwarranted amendment to the legislative scheme" to put the onus on the FTC to show injury to competition when it is not "an unwarranted amendment" of the same "legislative scheme" to hold the buyer liable for an action Congress never expressly outlawed appears nowhere in the opinion.

43. See *supra* n. 24, 70224, at 75851; 70225, at 75861.

44. The reasoning of the majority in both cases is the same, hence the two have been treated as one decision.

45. Judge Moore here quoted Handler, *Review of Antitrust Developments*, THE RECORD, Ass'n of the Bar of the City of New York, Vol. 17, No. 7, pp. 402-403 (October 1961). The same remark appears in Handler, *supra* n. 28.

enough for a buyer to discover whether a seller is offering proportionally equal prices to all buyers. For that reason Congress accorded the buyer with defenses in 2(f). Here, however, the Commission has charged the buyer with a knowledge much more difficult to ascertain and has accorded him none of the defenses available under 2(f). Such a result stifles bargaining competition, vastly increases the seller's power in a bargaining situation, and creates laws "which Congress for good reason has not enacted."⁴⁶

Undeniably the FTC and the Second Circuit have read and applied 2(d) and section 5 *in pari materia*. On the other hand, none of the dissenters, including the extra-judicial Professor Handler, has considered the decisions specifically in the light of *pari materia* construction. Professor Oppenheim has approved of this phase of the FTC ruling. "A section 5 count may be invoked when the transaction or practice is *equivalent* to that within the coverage of the Clayton Act but a jurisdictional deficiency bars resort to the Clayton Act. In such instances, the Commission should sustain the burden of proving violation in accordance with the statutory standards and tests of violation applicable to the particular Clayton Act provision to which the jurisdictional deficiency is pertinent."⁴⁷ Only to the extent that the buyer's practice is the equivalent of a 2(d) violation is the Commission safe in using section 5 to reach the otherwise exempt buyer. He shares with Commissioner Tait the trepidation that the language "supplement and bolster" used by the Commission is too strong. Accordingly he urges administrative-judicial restraint.⁴⁸ That this ruling extends the concept of a *per se* violation seems also not to trouble him in that the "majority opinion . . . does not appear to open the door to an overall *per se* violation approach to section 5."⁴⁹

Professor Oppenheim's argument is certainly more reasonable than either that of the Commission or of the Second Circuit. Fallacies, however, do appear in it. The concept of equivalent practices goes back to the Attorney General's Report. The Committee there recommended that those prac-

46. As in the *Grand Union* dissent, Judge Moore quotes Professor Handler with favor and to good effect.

47. Oppenheim *supra* n. 18, at p. 851.

48. *Ibid.*, at p. 844-845.

49. *Ibid.*, at p. 843.

tices which were economically equivalent to Robinson-Patman violations be condemned.⁵⁰ But this was a part of a fuller suggestion: to harmonize the Sherman Act, the Clayton Act and its amendments, and section 5 of the FTC Act, a rule of reason approach should be taken with regard to 2(c)-2(e) of Robinson-Patman;⁵¹ the 2(c) and 2(b) defenses should be infused into those subsections by judicial interpretation of 2(d) and 2(e), legislative amendment of 2(c);⁵² and the practices which were economically equivalent of Robinson-Patman violations should be reached.⁵³ Putting defenses into 2(c)-2(e) violations and into their economic equivalents was an integral part of reaching those equivalents. Professor Oppenheim has eschewed this view for his present position that the "door" has not been opened to a wider *per se* application and that "congressional amendment is needed if this *per se* approach is to be converted into a Rule of Reason inquiry . . .".⁵⁴ As to congressional amendment, Oppenheim has himself stated that such legislative action is "a forlorn hope".⁵⁵ Rather than a wider application of a *per se* rule, what is really to be feared is the depth of its thrust. Antitrust statutes providing for *per se* illegality are few, but the cases prosecuted under those statutes are many. Within Robinson-Patman the Commission has shown a comparative abandon in its use of 2(c), a *per se* section, while its use of 2(a) and especially 2(f) is a study in administrative circumspection.⁵⁶ That Professor Oppenheim is not unaware of these facts of FTC life tends to abrade the conviction of his arguments.

Nevertheless, it is a sound principle that what is illegal for a seller to give is illegal for a buyer to receive. The FTC and the Second Circuit have applied this theory through

50. AG Rep. *supra* n. 11, at p. 148.

51. *Ibid.*, at pp. 131-132, 196.

52. *Ibid.*, at pp. 192-193.

53. *Ibid.*, at p. 148.

54. Oppenheim, *Selected Antitrust Developments*, 15 A.B.A. ANTITRUST SECTION 37, 63 (1959).

55. *Ibid.*, at p. 63.

56. Rowe, *supra* n. 8, at pp. 303-304. The figures cited by this authority speak for themselves. "Of the more than 900 Robinson-Patman complaints issued by the FTC from 1936 to 1960, only 34 have concerned buyers' receipts under Section 2(f)." Rowe concludes:

"By a paradox of history, the small merchant, the intended beneficiary of Congress, became a prime victim of the Robinson-Patman law.

Nearly one half of *all* Robinson-Patman orders issued by the FTC until 1957, and about a third of *all* Robinson-Patman complaints since, are based on the so-called Brokerage Clause of the Act [2(c), a *per se* section], typically involving puny respondents from the backwaters of business."

the medium of section 5. However, there is a distinctly different means by which the same principle could have been realized without creating a *per se* violation. Buyers, under 2(f), are forbidden knowingly to receive price discriminations. The Supreme Court in *Automatic Canteen* left open the question whether inducing *indirect* price discriminations could be prosecuted under 2(f).⁵⁷ Upon the premise that what the defendants in these two cases received were price discriminations indirectly achieved, the buyers could have been held in violation of section 2(f). And upon the premise that harmony should be struck between the Robinson-Patman Act and the concepts of reasonability of the Sherman Act, proceeding under 2(f) is the preferable method to that actually chosen by the Commission.

The facts in each case show that complying sellers were making payments to the defendants in the guise of advertising allowances. In *Grand Union*, the defendant was receiving the total payment that one quarter of its suppliers were making to the advertising agency, and 5% commission on the remaining payments. To whatever use this money was put by the buyer, when a seller grants a rebate he has effectively lowered his price to the recipient. Grand Union alone among other stores its competing line received this lower price. Such a practice is outlawed by 2(f). The facts in *American News* indicate an even stronger case for applying 2(f) because, in addition to straight rebates which represented lower ultimate prices, there was evidence that defendant was using this money to better its competitive position in the market by outbidding other newsstand dealers for choice locations. Certainly, the subsection of the Robinson-Patman Act that forbids knowing receipt of discriminatory prices could have been used against these two buyers, and indeed there is a suggestion that it might in the majority opinion of the Commission in *Grand Union*.⁵⁸ This argument

57. See *supra* n. 10. Of its interpretation of 2(f) the Court at footnote 14 of the majority opinion said: "We do not, in so reading 2(f), purport to pass on the question whether a 'discrimination in price' includes the prohibitions in such other sections of the Act as §§ 2(d) and 2(e)."

58. See *supra* n. 16, ¶ 28,980 at 37482. The majority opinion quotes Rep. Utterback from his exposition of 2(f):

This paragraph makes the buyer liable for knowingly inducing or receiving any discrimination in price which is unlawful under the first paragraph of the amendment. That applies both to direct and indirect discrimination; and where, for example, there is discrimination in terms of sale, or in allowances connected or related to the contract of sale, of such a character as to constitute or effect an indirect

is implicit in Judge Moore's *American News* dissent⁵⁰ and is an economically sound view.

The FTC has not found 2(f) an easy section to work with. To meet its burden of proof the Commission must show that the price received is unlawful under 2(a) and that the buyer knew the price to be unlawful. Further, the buyer's defenses must be negatived: that there is injury to competition, that the price received cannot be cost justified by the seller, and that the lower price has not been granted in a good faith effort to meet competition. The very burden the FTC must meet to show an illegal receipt is, however, a guarantee that the section would be used with discretion. Moreover, by according the buyer with these defenses, a *per se* violation is avoided. To the extent that *per se* illegality is at odds with the Rule of Reason approach, the use of 2(f) creates an additional harmony between Robinson-Patman and other anti-trust concepts. This is entirely in keeping with the spirit of *Automatic Canteen* and the Attorney General's Report. To reach through the medium of 2(f) buyers who induce 2(d) violations is to more truly render an *in pari materia* construction of the Robinson-Patman Act. While this is vulnerable, as is the approach the FTC did choose, to the charge of judicial legislation,⁶⁰ it alone of the two theories has the virtue of condemning economically equivalent acts as it extends the Rule of Reason in a fashion consistent with earlier decisions.⁶¹

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discrimination in price, the liability for knowingly inducing or receiving such discrimination or allowance is clearly provided for under the later paragraph above referred to. 80 Cong. Rec. 9419 (1936).

The opinion then concludes that this statement "may well be interpreted to mean that the knowing inducement or receipt of a disproportionate allowance in violation of section 2(d) . . . is unlawful under Section 2(f)."

59. See *supra* n. 24.

60. It is interesting to speculate whether Commissioner Tait, Judge Moore, or Professor Handler would have been quite so strongly concerned with the creation of a new violation had it been, as suggested here, one replete with defenses rather than a *per se* violation.

61. The difficulty of proving a 2(f) charge as opposed to the comparative ease of proving *per se* illegality is why, one suspects, the FTC chose the latter course. It is true that the "Congressional road-map of directions and intended destinations for harmonization of the major antitrust laws does not compel travel over one statutory road . . . Congress allowed for exploration of new within the Commission's delegated authority." Oppenheim, *supra*, n. 18 at 854. Nevertheless a new interpretation creating a *per se* violation is deplorable not only because such a holding creates disharmony with the other antitrust laws but because of the

enthusiasm within which the FTC prosecutes *per se* violations. Further, as Professor Handler wryly notes, "the Commission's approach to statutory construction is a one-way street," citing *Exquisite Form Brassiere, Inc.*, Trade Reg. Rep., p. 29195 at 37589 (Oct. 31, 1960), which denied that the meeting-competition defense applied in a 2(d) proceeding. He quotes the Commission:

We cannot supply what Congress has studiously omitted. Since subsection 2(b) refers only to a *seller's* furnishing a service or facility and since there is nothing in the history of the bill or in the language of the statute to support respondent's contentions that this provision may be applied defensively to a charge of violation of Section 2(d) we must deny to this extent respondent's appeal. Handler, *supra*, n. 24, at p. 92, n. 105.

While the attitude of the Commission can be understood, if not appreciated, less easy to reconcile is that of the Second Circuit. However, not all Federal Courts are as easily disposed to constructions of such doubtful latitude. The Fifth Circuit last year affirmed an FTC order against automotive parts cooperatives for knowingly receiving discriminatory prices in violation of 2(f). The coops were, the court conceded, formed to achieve greater bargaining power to enable the jobber members to compete with large integrated chain stores, oil companies, and automobile dealers. Nevertheless, even though the result be to further entrench the larger competitors, "the result, if bad economics or bad social policy, is for Congress to change." *Mid-South Distributors v. FTC*, 287 F. 2d 512 (5th Cir., 1961). Better still, a District Court moved far in the direction of harmony when it reached the conclusion that the 2(b) defense should be permitted in a 2(d) case. *Delmar Construction Co. of Florida v. Westinghouse Electric Corp.*, Trade Reg. Rep., p. 69, 946 (S. D. Fla. 1961). The court refused to strike the defense of good faith meeting of competition, saying that "because of the close inter-relation of § 2(d) and § 2(e) it is both logical and reasonable to recognize such defenses in cases arising under § 2(d)."